DEPARTMENT OF STATE REVENUE
LETTERS OF FINDINGS NUMBERS:
01-0056(1990-1999);
01-0058(1990-1999); 01-0059(1990-1999);
01-0060(1997-1998); 01-0061(1997-1999)
Gross Retail and Use Tax—Public Transportation Exemption
Tax Administration—Statute of Limitations
Tax Administration—Method of Calculation
Tax Administration—Penalty

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ISSUES

I. Gross Retail and Use Tax—Public Transportation Exemption

Authority: **IC § 6-2.5-5-27** **45 IAC 2.2-5-61**
IC § 6-8.1-5-1(b) **45 IAC 2.2-5-62**

Taxpayer protests proposed assessments of the state's gross retail and use taxes, arguing that his companies fall under the public transportation exemption.

II. Tax Administration—Statute of Limitations

Authority: **IC § 6-3-4-1** **45 IAC 15-5-7**
IC § 6-3-4-3
IC § 6-8.1-5-2

Taxpayer protests the Audit Division's assessment of 10 years of tax liability.

III. Tax Administration—Method of Calculation

Authority: **IC § 6-8.1-5-4**

Taxpayer protests the Audit Division's method of calculating taxes owed where no records were available.

IV. Tax Administration—Penalty

Authority: IC § 6-8.1-10-2.1 45 IAC 15-11-2

Taxpayer protests the 10% negligence assessment.

STATEMENT OF FACTS

Taxpayer, through a single Indiana-domiciled, Illinois-organized corporation, owns 5 different companies that, in one form or another, provide a variety of services to carriers engaged in the interstate transportation of goods and property. The companies are domiciled in Indiana, but organized under the laws of Illinois. Taxpayer's companies clean and occasionally sell repair parts to these customers; some of these carriers transport hazardous material requiring special cleaning before hauling their next load of goods and/or property. Taxpayer, believing that his companies were exempt from Indiana's gross retail and use taxes because they were engaged in public transportation, never filed any Indiana tax returns. Additional facts will be supplied as necessary.

I. Gross Retail and Use Tax—Public Transportation Exemption

DISCUSSION

Taxpayer protests proposed assessments of the state's gross retail and use taxes, arguing that his companies fall under the public transportation exemption. Under IC § 6-8.1-5-1(b), a "notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." The public transportation exemption from gross retail and use taxes, IC § 6-2.5-5-27, provides that transactions "involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property."

Taxpayer's companies clean trucks, tankers, and railcars that provide public transportation for property; the trucks, tankers, and railcars are covered by the exemption; taxpayer is not. *See also*, 45 IAC 2.2-5-61 and 45 IAC 2.2-5-62. "In order to qualify for exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation. The tangible personal property must be indispensable and essential in **directly** transporting persons or property." 45 IAC 2.2-5-61(c). **(emphasis added)** When taxpayer's customers purchase goods and/or services from one of taxpayer's companies, the exemption applies because the customers are in the business of transporting persons and/or property. When taxpayer purchases goods and/services in order to clean customer trucks, tankers, and railcars, the exemption does not apply because taxpayer provides a service. Taxpayer argues that his services to his customers are "reasonably necessary, "indispensable and essential in directly transporting persons and/or property." Taxpayer also argues that if he did not perform these services, carriers would be unusable for public transportation and the flow of interstate commerce would be impeded.

45 IAC 2.2-5-61(b) defines public transportation as meaning and including the following:

> movement, transportation, or carrying of persons and/or property for consideration, by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the facts that a company possess a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

Taxpayer's business activities fail to fall under the definitions in 45 IAC 2.2-5-62. This regulation exempts from the state gross retail and use taxes "the sale, storage, or use of tangible personal property which is directly consumed in the rendering of public transportation of persons or property. Subsection (c) limits the exemption to "tangible personal property directly consumed in rendering public transportation." Subsection (d) provides that in order to qualify for the exemption, "the consumption of tangible personal property must be reasonably necessary to the rendering of public transportation." These subsections apply to taxpayer's customers, not taxpayer's companies.

Taxpayer's companies do not engage in any of the above-defined activities. Taxpayer argues that the services he provides, and the tangible personal property used in providing those services, are "indispensable and essential in directly transporting persons or property" because in a majority of cases, the carriers must be thoroughly cleaned and occasionally repaired before the customer can use the vehicle again. Taxpayer supplies as additional support for his various arguments that he has a regulatory number assigned to him by the Federal Department of Transportation. However, under 45 IAC 2.2-5-61(b), this fact is not dispositive of taxpayer's tax liability under Indiana law.

Taxpayer's arguments, while interesting, do not meet the regulatory language cited *supra*. Taxpayer's companies do not transport either persons or property. His customers do. While the services taxpayer provides are important, they are not indispensable. The Department must reject taxpayer's invitation to extend the coverage of the public transportation exemption provided by statute and regulation to his business enterprises.

FINDING

Taxpayer's protest concerning proposed assessments of the state's gross retail and use taxes, based on his theory that his companies are entitled to the public transportation exemption, is denied.

II. Tax Administration—Statute of Limitations

DISCUSSION

Taxpayer protests the Audit's Department's assessment of 10 years of tax liability.

The Department has the authority under 45 IAC 15-5-7 to "look back" more than three years for assessing tax liability under certain circumstances. Subsection (f) provides "[t]hat the running of the statute of limitations for purposes of assessing unpaid taxes will not start if the taxpayer fails to file a return which is required by any listed tax provision. Also, a substantially blank, unsigned or fraudulent return will not start the running of the statute of limitations." Taxpayer has stated that he has had operating losses for the past 6 years and that it is not fair to pick up tax liabilities so far in the past.

The Department considered taxpayer to be a "non-filer" at the time of the audit. Taxpayer has alleged he has filed Indiana income tax returns for 1996 and 1997, filed in 2000 and 2001 respectively. Indiana Code section 6-8.1-5-2 provides for a three-year statute of limitations from the latest filing date of a return, from the due date of a return, or from the end of the calendar year that contains the taxable period for which the return is filed. However, without documentary proof, i.e., copies of the income tax returns, the Department has no recourse but to pursue its statutory obligations. The profitability of a specific business—or lack thereof—is not determinative of a taxpayer's statutory duty to file Indiana tax returns**.** While the taxes at issue in this protest concern unpaid sales and use taxes, the authority behind the income tax filing requirements is crucial because the IT 20 form contains a section where taxpayers are required to self-assess use tax. Taxpayer was therefore on notice that he was required to assess use tax, and remit it to the Department, regardless of the profitability of his companies. See discussion under Method of Calculation, *infra.* Taxpayer has known since the department's June 2001 Opinion Letter that documentary proof would be required in order to successfully protest the Department's assessment of 10 years of tax liability for unpaid taxes.

FINDING

Taxpayer's protest concerning the Department's assessment of 10 years of tax liability is denied.

III. Tax Administration—Method of Calculation

Taxpayer protests the Audit Division's methodology in calculating tax liability for years where records were not available.

DISCUSSION

The methodology the Audit department used to calculate use tax liability was based on years for which records were available. Audit arrived at a separate total for each year having records, averaged that total, and used that figure for each of the tax years where records were not available. Where records were available, the actual amounts were properly assessed for those tax years. Taxpayer's major argument against this methodology appears to be that each company, for the first few years, was just getting started, and had start-up costs. That is, the companies were not profitable during the years where no records were available. Audit looks at records of actual purchases and subsequent usages of tangible personal property. If the records are not available pursuant to IC § 6-8.1-5-4, then Audit must use whatever records are available to arrive at a figure for tax years where a taxpayer has not kept the proper records. It is the taxpayer's duty to keep records of its business transactions. ("Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). Profitability—or lack thereof—neither excuses taxpayer's neglect nor relieves him of the statutory duty to collect and remit gross retail and use taxes.

FINDING

Taxpayer's protest concerning Audit's methodology in calculating taxes for tax years where records had not been kept is denied.

IV. Tax Administration—Penalty

Taxpayer protests the imposition of the 10% negligence penalty. Taxpayer argues that it had reasonable cause for failing to pay the appropriate amount of tax due, based solely on taxpayer's interpretation of the relevant statutes and regulations.

DISCUSSION

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . ." In determining

whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer has failed to set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Although some of the questions raised by taxpayer involve technical issues of interpretation and applicability, given the totality of the circumstances, waiver of the penalty is inappropriate in this instance.

FINDING

Taxpayer's protest concerning the assessment of the 10% negligence penalty is denied.

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